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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 691

WILLIAM M. BROWN,

Petitioner,

—v.—

KENNETH C. ROYALL, Secretary of the Army, and EDWARD F. WITSEL, the Adjutant General,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

William M. Brown, petitioner, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia, decided October 13, 1949, granting a motion to affirm (R. 113), and the order of the United States Court of Appeals for the District of Columbia denying petitioner's motion for leave to argue and for rehearing, dated January 12, 1950 (R. 117). The Court of Appeals affirmed the order of the District Court for the District of Columbia dismissing the complaint, which prayed for a declaratory judgment

declaring and determining petitioner's rights resulting from a general court-martial; and for further relief setting aside the general order of the court-martial because of lack of jurisdiction and failure of the military authorities to comply with due process of law, and for all other relief incidental to the setting aside of the order of the general court-martial (R. 13).

The instant case emanated from an order of a general court-martial which was convened pursuant to par. 1, S. O. #45, 14 February 1946, Headquarters, Seventh Army, APO 758, U. S. Army (R. 18-20), which tried petitioner without giving him the rights guaranteed and assured him under Article of War 70, now AW 46B (Title 10, U. S. C. A. 1517, as amended), and without affording petitioner a fair opportunity to interview witnesses and to prepare properly his defense, and after improperly designating petitioner's personal counsel to act as investigating officer in order to IMPARTIALLY investigate the matter and report back on the charges and specifications and refer the matter to trial.

Despite petitioner's objections and protestations, respondents compelled petitioner to stand trial in absolute violation of any rights to which he was entitled pursuant to the Articles of War, Army regulations, the rules promulgated by the Judge Advocate General's Corps, the statutes of the United States, and the instructions, rules and regulations promulgated for the issuance of charges and specifications prior to the referral of the same to trial by a general court-martial. As a result of such action, petitioner was denied, as an American citizen, a full, fair and impartial trial on the merits.

Opinions Below

The opinion of the District Court (R. 96-99), is reported at 81 F. Supp. 767. The order and opinion of the United States Court of Appeals for the District of Columbia (R. 113, 117) is reported at F. 2d .

Jurisdiction

The jurisdiction of this Court is invoked under sec. 347 of the Judicial Code & Judiciary (28 U. S. C. A. 347), as amended by the Act of June 25, 1948, c. 646, 62 Stat. 928; Judiciary and Judicial Procedure, Title 28, U. S. C. A. 1254.

Questions Presented

1. Were petitioner's rights violated and abridged when the request for an adjournment, in order to interview witnesses and obtain depositions, was denied?

2. Were petitioner's rights violated and abridged when Command designated petitioner's counsel to act as investigating officer?

3. Were petitioner's rights violated and abridged when Command, through the investigating officer, refused to grant petitioner sufficient time to interview witnesses, obtain depositions and prepare his case for trial?

4. Were petitioner's rights violated and abridged by the lack of action of respondents, in not promptly prosecuting the case as prescribed by the Articles of War and the Manual of Court-Martial, by permitting a period of eight months to elapse between the presentment of the first set

of charges and specifications in June of 1945, and the presentment of the second set of charges and specifications in January of 1946?

5. Could the court-martial take jurisdiction over petitioner and permit the prosecution to produce evidence at the trial which was obtained through an investigating officer who had been retained as petitioner's personal counsel prior to his designation as investigating officer?

6. May petitioner attack the procedure utilized by respondents prior to the trial and demonstrate that said procedure was improper, and abridged and violated every fundamental right that petitioner possessed?

7. May petitioner attack the pre-trial procedure and thereby demonstrate that the court-martial had improperly assumed jurisdiction so that any action which it took was either voidable, or null and void?

8. May the military authorities violate and ignore the provisions of the Articles of War and continue to assert a defense that the civil courts may not inquire into the validity of a court-martial's order?

9. If the original procedure was improper, invalid and contrary to law, was the order of the general court-martial void for lack of due process and the abridgment of petitioner's rights?

10. Where the petitioner is no longer in custody, and there are no physical restraints, may petitioner employ declaratory judgment to obtain a declaration of his rights, as well as attack the court-martial's jurisdiction?

Statement of Facts

All of the matters hereinafter referred to and the subject matter of this suit occurred AFTER the German capitulation and not during the "shooting" war. It was not in the face of the enemy.

Petitioner was a Lieutenant Colonel in the Army of the United States detailed to the American Provisional Military Government in Germany. On or about June 27, 1945, petitioner was examined by the Inspector General concerning the various matters which subsequently became part of the subject matter submitted at the court-martial. These matters principally involved charges of appropriating to his own use certain Reichmarks and of engaging in unlawful currency transactions. At or about the time petitioner was examined by the Inspector General, he conferred with one Major Benjamin B. Taylor, in the confidential relationship of attorney and client. Petitioner related a great many matters in confidence to Major Taylor, and asked his advice. Within a few days after the examination by the Inspector General and the conference with Major Taylor, the latter was appointed Investigating Officer by "Command" to proceed with the investigation of those charges against petitioner pursuant to AW 70 (10 U. S. C. A. 1542).

Petitioner appeared before Major Taylor and was examined. Petitioner asked to have certain witnesses called and to have their depositions taken. Petitioner also requested an adjournment of the hearing so that he could present adequate proof that the charges were groundless. Major Taylor wrongfully refused to grant the adjournment on the ground that the 8th Corps, of which they were both officers, was being deactivated, and Command had "requested" immediate action upon this case.

After the investigation, formal charges were preferred, but no further proceedings were held. Thereafter, peti-

tioner returned to the United States and went to a separation center for processing prior to discharge from the service.

On the 27th day of December, 1945, pursuant to Paragraph 20, Special Order 360, Hq. Fort Dix, State of New Jersey (R. 14-15), the petitioner reverted to inactive status and entered upon his terminal leave. On the 30th day of January, 1946, pursuant to Paragraph 129, Special Order 30, Hq. Fort Dix, State of New Jersey (R. 117), petitioner, over his objection, was recalled to active duty for the sole purpose of subjecting him to the jurisdiction of a general court-martial. Upon reporting to Fort Dix, plaintiff was immediately transported to Heidelberg, Germany, where his request for postponement to obtain witnesses was refused and he was tried, found guilty and dismissed from the Service, together with other penalties. As a result of such judgment, petitioner has been and continues to be denied valuable constitutional rights and other valuable and legal rights and privileges.

At the trial, petitioner was confronted with charges and specifications which were different from those preferred in June, 1945.

Petitioner never had an opportunity to call his witnesses, nor to examine or cross-examine the witness called by the Army in support of the new charges.[1] At the trial, petitioner claimed that he had no opportunity to call his witnesses; and respondents refused to call them, saying that they were no longer available since they were now living in the Russian Zone. Therefore, petitioner was unable to properly present his own defense.

Petitioner pointed out to the court-martial that, because the Investigating Officer refused to examine his witnesses,

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1 See pp. 58-59, Testimony of General Court-Martial—Statement by accused and by Defense Counsel.

and because of the latter's refusal to adjourn the examination for the purpose of calling petitioner's witnesses, petitioner had lost every opportunity to defend himself. It is petitioner's contention, *inter alia*, that he has been irreparably damaged by virtue of the respondents' noncompliance with the requirements of AW 70.

Reasons for Granting the Writ

1. Petitioner's constitutional rights and guarantees were abridged when respondents compelled petitioner's counsel and legal advisor to act as Investigating Officer prior to the referral of the charges and specifications to a general court-martial for trial.

2. The respondents, by failing to comply with AW 70 (now AW 46B), in all respects, lost jurisdiction and could not refer the case involving petitioner to general court-martial for trial.

3. By refusing to grant petitioner an extension of time to interview witnesses and obtain their depositions, respondents violated the Articles of War and the constitutional guarantees to petitioner, and therefore the order of the general court-martial was either voidable, or null and void.

4. Petitioner's rights were abridged and his constitutional guarantees were violated by virtue of the long delay which intervened between the referral of the original charges and specifications in June of 1945, and their subsequent amendment, referral and presentment in January of 1946.

5. Petitioner's case should not have gone to trial until petitioner was granted the opportunity of interviewing

witnesses and obtaining their depositions, since these witnesses were to remain in the Russian Zone of occupation and respondents knew, or should have known, that it would be difficult or impossible to contact these witnesses once American authority in the area had been terminated.

6. By flagrantly violating the canons of ethics for professional conduct of attorneys, and by the directions and orders issued by Command, petitioner's counsel was obliged to violate his oath as an attorney and counsellor at law, and as a result, all proceedings which continued after said counsel acted as Investigating Officer were illegal, invalid, null and void.

7. Cases such as this one, predicated on errors made in the preliminary stages, which result in a denial of due process and which terminate in the issuance of orders that deprive an individual of his constitutional rights and guarantees, and which further deprive an individual of rights granted to him by virtue of service to his country as an officer and soldier, are entitled to more careful scrutiny and care prior to the issuance of an order for a court-martial; and where, as here, errors were made in the preliminary stages, unless they are corrected, they should not be permitted to result in an order of a general court-martial which deprives the accused of his constitutional rights and any other rights granted him by Congress.

WHEREFORE, your petitioner prays for a writ of certiorari to be issued under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this court a complete transcript of the record and all proceedings in the instant cause, so that this case may be reviewed

and determined by this Court and that the judgment of the United States Court of Appeals for the District of Columbia may be reviewed, and that the petitioner may be granted such other and further relief as may seem just and proper in the premises.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Summary of Argument

1. Certiorari should issue to settle the question whether Command may direct a person retained as counsel for an accused to surrender his retainer and act as investigating officer in the case which he was retained to defend.

2. Certiorari should issue to settle the question whether an accused may be compelled to go to trial on substantial issues without being given the opportunity to prepare his case, interview his witnesses, and obtain depositions from them.

3. Certiorari should issue to settle the question whether failure to comply with and adhere to the rules and regula-

tions promulgated by the Military Establishment, the Judge Advocate General Corps and the statutes of Congress, has created a jurisdictional bar which prevents a general court-martial from hearing the case and issuing its final determination.

4. Certiorari should issue to determine whether the civil courts may decide whether the preliminary stages prior to court-martial are regular and in accordance with law; and, if they are not, determine whether a court-martial may take jurisdiction over the accused despite the failure of the preliminary procedures to fully comply with rules, regulations and existing law.

5. Certiorari should issue to settle irregularities in procedure prior to actual court-martial.

6. Certiorari should issue so that a determination may be made of the issue whether or not declaratory judgment may be utilized to determine the rights of a person who has been dismissed from the Army by order of court-martial and who is no longer in custody.

7. Certiorari should issue to determine whether petitioner's rights were abridged by virtue of the undue delay that occurred between the preparation and presentment of the first set of charges and specifications in June of 1945, and the preparation and presentment of the second set of charges and specifications in January of 1946.

8. Certiorari should issue to correct the order of the United States Court of Appeals for the District of Columbia in this case, which involves the abridgment of petitioner's constitutional rights.

Argument

William M. Brown, herein referred to as "petitioner," was a Lieutenant Colonel in the Army of the United States, detailed to the American Provisional Government in Germany. Petitioner, prior to the matters involved in this case, had a brilliant record of military service which was beyond reproach. He had served over twenty-seven years in the United States Army. He was a lieutenant in World War I. He served from that time in the organized reserve, rising to the rank of major. He entered World War II and was advanced to the rank of lieutenant colonel and was made military governor of the Weimar area in Germany.

Petitioner was awarded the Bronze Star Medal (U. S.); the Croix de Guerre with Silver Star (France); the Croix Militaire, First Class (Belgium); and four battle-participation stars. At the time petitioner was separated from the Army at Fort Dix, he was sworn in as a member of the reserve at the same rank, lieutenant colonel.

Some time in June of 1945, Colonel Brown was ordered to report to the Inspector General concerning certain matters. After one conference with the Inspector General, no further consultations were held, and petitioner did not hear or receive word from the Inspector General regarding the matters about which they had consulted. These matters subsequently culminated in five charges and specifications which, for these purposes, may be summarized as follows:

That the accused appropriated to his own use and benefit about 96,000 Reichmarks of the value of $9,600.; that he unlawfully disposed of 3½% Treasury Bonds of the Reich having a value of about $1,500.; that he had wrongfully

engaged in currency transactions whereby he had received Allied German marks in exchange for German Reichmarks and that he had wrongfully advised one K. J. Vogler, a civilian, to leave town to avoid arrest.

To all of these charges and specifications he had pleaded not guilty and proclaimed his innocence, while the Court Martial found him guilty on each and every charge and specification except that they reduced the 96,000 Reichmarks having a value of $9,600. to 30,000 Reichmarks, having a value of $3,000. The Reviewing Officer, however, sustained the Court Martial only to the extent of the single charge that the accused had converted to his own use 30,000 Reichmarks of the value of $3,000. and dismissed all the other charges and specifications.

However, prior to his conference with the Inspector General, petitioner consulted with one Major Taylor, an attorney at law, and he discussed his situation with Major Taylor in the confidential relationship of attorney and client. Subsequently, petitioner was directed to appear before an investigating officer regarding certain charges and specifications which had been drawn. Upon appearing before said investigating officer, petitioner discovered that said investigating officer was Major Taylor, the officer whom he had originally consulted as an attorney at law, and to whom many matters had been confided by virtue of the relationship of attorney and client. Petitioner requested Major Taylor to disqualify himself or, in the alternative, to give petitioner sufficient time to interview his witnesses and to obtain depositions from those whom he knew would be unavailable as soon as the Provisional Government left the area. Major Taylor informed petitioner that the 8th Corps, of which he was an officer, was to be deactivated within five days and that Command had requested expeditious handling of the case. Petitioner's requests were therefore denied in full.

After the investigation conference was over, petitioner heard no further word about the case and subsequently, in December of 1945, he was returned to the United States and discharged from the Army, subject to the completion of his terminal leave.

After approximately thirty days' terminal leave had expired, petitioner was directed to return to the Army. Over petitioner's objection, he was compelled to report to Fort Dix, from which post he was flown to Heidelberg, Germany, and there compelled to stand trial on amended charges and amended specifications, about which petitioner had no knowledge and had no opportunity to meet or to defend.

The charges were of a very serious nature. Petitioner was compelled to defend them without proper preparation and without the slightest courtesies, usually granted to an offender accused of committing the most heinous offense. The handling of petitioner's case may be likened, in some respects, to the treatment accorded the Negroes in the Scottsboro case. The Army flagrantly violated every right guaranteed petitioner. In utter disregard of the rules and regulations, Articles of War, and other statutes applicable thereto, this petitioner was cashiered from the service.

ALL OF THE INCIDENTS WHICH OCCURRED IN THIS CASE TOOK PLACE AFTER THE SHOOTING WAR WAS OVER, AND WHEN THE ARMY BECAME AN ARMY OF OCCUPATION RATHER THAN AN ARMY OF DESTRUCTION.

Respondents cannot claim exigencies of a military nature prevented them from according this petitioner the rights guaranteed him by the rules and regulations, Articles of War, and statutes applicable thereto. The sole problem that was involved was the deactivation of a particular corps of troops who were not involved in fluid battle front.

It is important for this honorable Court to know that we do not attack the court-martial proceedings *per se* at this time. The attack is leveled against the preliminary procedures which were so flagrantly violated in utter disregard of rules, regulations and existing law; that this petitioner could not have had a fair trial or a trial on the merits because of the major error committed at the outset of these proceedings.

The error may be likened to the improper drafting of an indictment or the improper empaneling of a Grand Jury. ***For, at the June, 1945 investigation, the very person who had been retained and consulted by petitioner as his counsel was ordered by Command to act as investigating officer.*** This was in absolute contravention of all known rules of propriety, codes of ethics, and all procedures governing the conduct of attorneys. The Court is respectfully referred to the *Military Justice Handbook, Dept. of the Army Pamphlet No. 27-6,* published in July, 1949, which states, at p. 2, sec. 1b, as follows:

> "b. Effect of prior participation in same case. No person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case may subsequently act in the same case as a member of the prosecution; no person who has acted as member, trial judge advocate, assistant trial judge advocate, or investigating officer in any case may subsequently act as defense counsel or assistant defense counsel in the same case unless he is expressly requested by the accused (AW 11). Whether counsel for either side have participated previously in any capacity in any case must be shown affirmatively in the record of trial (MCM, App. 5)."

We respectfully maintain that the facts in this case are different from any other case presented to this honorable

Court. In principle, the theory of this case is similar to some heretofore decided by this honorable Court; but because of the great difference in the facts, different principles of law must be applied in resolving the issues which are raised.

May Command direct defense counsel to relinquish his position after being retained and consulted by accused and to assume the position of investigating officer or trial judge advocate? May Command move the case for trial at any time that it wishes; or permit a period in excess of eight months to intervene before bringing the case on for trial? May Command so flagrantly violate the fundamental rights of an individual that it can deny a request for adjournment to prepare a case for trial, PARTICULARLY WHEN COMMAND KNOWS THAT CERTAIN WITNESSES WILL BE IN THE RUSSIAN ZONE OF OCCUPATION AND MAY NEVER BE ACCESSIBLE?

The issues in this case are extremely simple. Were it not for the fact that the judgments of military courts have always been protected from the intervention of civil courts, the questions involved in this matter would have been resolved long ago. It is the preliminary stages of the investigation, which is comparable to arraignment before a magistrate or commissioner, that is involved.

Is the law such, that, because a man is not in custody and the remedy of *habeas corpus* is therefore unavailable to him he may not attack the jurisdiction of a court-martial? In equity and good conscience, there must be some other means to determine whether or not a court-martial has jurisdiction without requiring the petitioner to be in custody.[1] There is no necessity to create an aura of

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1 The District Court held that the only way in which the court-martial's jurisdiction could be attacked is by resort to the writ of *habeas corpus*, and that no other avenue was available.

secrecy or holiness around a general court-martial order. If the preliminary stages were correct, unquestionably the order of the court-martial should stand. But if the preliminary stages were incorrect, then the order of the court-martial must fail, unless those preliminary stages affected solely simple procedural rights. *But in this case, more than simple procedural rights were involved. They were the very right of representation, the right of investigation by an impartial, unbiased investigating officer, the right to interview witnesses, to obtain depositions, and all of the other normal processes incident to preparation for trial.* ALL OF THESE RIGHTS WERE DENIED THIS PETITIONER.

We respectfully refer this Court to the colloquy among the accused, his defense counsel and the court-martial at the time the court-martial hearing was in progress. These matters have been adverted to in the proceeding before the District Court and also in the record on appeal in the United States Court of Appeals for the District of Columbia. At that time, petitioner made the following statement to the court:

> "Accused: Gentlemen of the court, to repeat what I have just said I feel that due to the haste and speed with which the investigation in this matter was conducted in June last, over a period of approximately three days and because of the fact that the 8th Corps headquarters was being deactivated as of June 30th, also due to the speed with which the present proceedings have been prepared and are being prosecuted, I having been allowed only the statutory period of five days in which to prepare anything with reference to this case, to summon any witnesses whatsoever, and due to the fact, particularly, that certain witnesses

whom I deem vital in this matter are not able to be present today, including for example, Lt. Colonel Logan, who could give, if he were present, all the circumstances concerning this last stipulation, also any witnesses, a civilian witness, employed by the Post Office from whom I have a statement here but cannot introduce it because of his absence and whose statement raises serious question about the amount that was removed from the Weimar post office, due to this and many other circumstances I feel that my rights have been seriously impaired and I have asked the defense counsel to prepare a statement which I would respectfully request the court to take into consideration, * * *"

Petitioner's counsel made the following statement:

"Defense: * * * Secondly, the defense desires to put on record at this time certain facts which although they are not facts upon the main issues of the case and therefore are not made in a sworn statement, nevertheless relate to the manner in which the case was investigated and brought to trial. It is felt that the court should be made aware of these facts inasmuch as they have hindered Colonel Brown in preparing his case. First, charges were prepared in a great hurry. The investigation was started on 27 June 1945, and charges were drawn up on 28th June, the Investigating Officer made his investigation on the 30th and indorsed it back to the 8th Corps headquarters on 1 July. The reason for this speed was that 8th Corps was closing on 8 July and there was great pressure to get this done. Because of this pressure and because Lt. Colonel Brown was anxious to co-operate in the investigation he was not fully accorded all the rights and privileges which are normally extended to a person

being investigated, neither on the Inspector General's investigation nor on the investigation by the Investigating Officer who was Major Taylor. Now, when Major Stockman, the Inspector General, questioned Colonel Brown on 27 June it was clearly understood that the investigation would be continued on the next day when Colonel Brown would be permitted to make additional and explanatory statements in that he would be shown all the writings, all the things pertaining to the investigation before everything was completed. This was not done, however, thereby a violation of paragraph 7, AR 20-30 was technically committed. Colonel Brown desired and intended to make further explanatory remarks especially with reference to the purpose for which he was holding this money and with reference to what he had learned recently of the character of this man Vogler. The opportunity to do this upon investigation never came and that very same night that Major Stockman had first interrogated him he went to the 8th Corps headquarters where he talked to the Staff Judge Advocate and the Judge Advocate referred him to the Chief of Staff, who *insisted that charges be preferred immediately.* The first indication that Colonel Brown had that any charges had been prepared was on the 30th, when Major Taylor came and talked to him and said that he was the Investigating Officer and upon the ensuing formal investigation Colonel Brown requested first of all that he be allowed to speak to counsel and second that the investigation be delayed so that he could present additional facts to the Investigating Officer and third that the investigation at least be turned over to some other officer at succeeding headquarters who could have more time to conduct the investigation and who would be more disinterested than Major Taylor was. All

these requests were denied. Colonel Brown was only given an oral resume of what the witnesses would testify. No written statements had been prepared at that time and because Major Taylor stated that he had to have the investigation completed immediately, Colonel Brown waived his right to cross-examine any of those witnesses. Now, secondly, Major Taylor should never have acted as Investigating Officer in this case. He was not an impartial officer as is required by Article of War 70. Two days before this investigation, Colonel Brown had gone to him in a confidential manner, I mean, referring to a confidential communication and had laid all the facts of the case before him and had requested his advice as an attorney to client relationship, then two days later Major Taylor was appointed Investigating Officer and acted as such. Thirdly, from the 30th June 1945 until the 3rd of February of this year [1946] Colonel Brown never heard anything more of the whole case. * * *" (Pp. 58, 59—Transcript of Court-Martial Proceedings. Emphasis supplied.)

We maintain that, by a denial of these rights, petitioner's fundamental guarantees were abridged to such an extent that the court-martial deprived him of his native-born prerogatives, in violation of the Constitution and statutes applicable thereto.

The problems which are presented to this Honorable Court in the case at bar are entirely new. There are no cases or precedents which we may urge in support of our position. This Honorable Court has seen fit to hold that AW 70 is not mandatory, but rather directory.[2] While we

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2 *Henry* v. *Hodges*, 171 F. 2d 401, cert. den. 336 U. S. 968.
Humphrey v. *Smith*, 336 U. S. 695.

respectfully differ with this Honorable Court's conclusion, we respectfully submit that the facts in the cases heretofore decided by this Court are so different from the facts of this case as to warrant further consideration.

This petitioner has been deprived of all the rights to which he would be entitled as a former officer of the Army of the United States. He is deprived of the rights guaranteed by the laws relating to veterans; the right to gainful employment as a civil service employee; and, in many respects, the right of employment by many large companies who place great regard on an honorable discharge from our military establishment.

We maintain that there is substantial Federal question involved. We maintain that there are procedural remedies involved in the case at bar which require clarification by this Honorable Court. Upon this clarification and determination rests the peace of mind of thousands of men in the Armed Services.

Trial before a military tribunal differs from a trial before a civil court as night differs from day. Under the circumstances, we urge upon this Court the right to be heard, and to present argument which will substantiate our position. These rights were denied by the Court of Appeals without granting petitioner the right to be heard on the issues involved.

Surely, in equity and good conscience, there is a remedy which will help this petitioner in returning him to the status he enjoyed prior to the order of the court-martial which dishonorably discharged him. An action for declaratory judgment is, in our opinion, the only method whereby all of petitioner's rights may be resolved in one action.

The issues involved in the case at bar present substantial questions which are new and novel and not covered by

precedents. They involve important questions concerning the meaning and scope of Supreme Court decisions.

The case of *Brown* v. *Hiatt*, 81 F. Supp. 647, aff'd 175 F. 2d 273, and presently before this Court (#359, October Term 1949)[3] in part resembles the case at bar. We maintain that a court-martial is a court of limited jurisdiction and therefore its jurisdiction may be collaterally attacked. Since there is no presumption of jurisdiction, it is open to collateral attack.

> *Collins* v. *McDonald*, 258 U. S. 416, 418, 42 S. Ct. 326, 327, 66 L. Ed. 692;
> *Givens* v. *Zerbst*, 253 U. S. 11, 19, 41 S. Ct. 227, 229, 65 L. Ed. 475;
> *McLaughry* v. *Deming*, 186 U. S. 49, 63, 22 S. Ct. 786, 46 L. Ed. 1049;
> *Runkel* v. *U. S.*, 122 U. S. 543, 556.

We respectfully maintain that we can accomplish a collateral attack on jurisdiction through the action of declaratory judgment.

The court-martial denied due process to petitioner by blindly accepting the pre-trial procedures as correct.[4] The wholly improper pre-trial procedures had such a prejudicial effect on petitioner's chances of a fair trial as to convict him before any evidence was put into the record. By hiding behind purely technical matter, respondents desire to maintain an injustice at the cost of petitioner's civil freedom.

The entire effect of denying to petitioner the right to examine his witnesses and to preserve their testimony; to

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3 Reversed March 13, 1950.

4 *Codified Military Injustice*, 35 Cornell Law Quarterly 151, 157-8.

hear the charges by the Government's witnesses and to examine said witnesses; the flagrant disregard of ethical codes whereby petitioner's counsel was compelled to surrender the defense of petitioner's case; the expressed desire of "Command" to "expedite" trial; and the long, unexplained hiatus between the original charges and the amended charges, were so calculated as to prevent petitioner from having a just trial on the merits.

Prejudicial error was committed at the pre-trial procedures.

1. Failure to accord petitioner the right to interview witnesses.

2. Compelling petitioner's counsel to act as investigating officer in flagrant disregard of custom, ethics and Army regulations.

3. Failure to impartially and thoroughly investigate the case.

4. Permitting a great period of time to elapse between presenting the charges and specifications, and the trial.

Von Moltke v. *Gillies*, 332 U. S. 708, MCM 1949, sec. 34(d), p. 27, AW ;
Johnson v. *Zerbst*, 304 U. S. 458;
Reilly v. *Pescor*, 156 F. 2d 632;
Anthony v. *Hunter*, 71 F. Supp. 823;
Hicks v. *Hiatt*, 64 F. Supp.

On the basis of the foregoing, therefore, we urge and it is most respectfully submitted, that the writ of certiorari should issue.

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IN THE

Supreme Court of the United States

October Term—1949

No. 691

WILLIAM M. BROWN,

Petitioner,

—v.—

KENNETH C. ROYALL, Secretary of the Army, and EDWARD F. WITSEL, the Adjutant General,

Respondents.

REPLY BRIEF FOR PETITIONER

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IN THE

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KENNETH C. ROYALL, Secretary of the Army, and EDWARD F. WITSEL, the Adjutant General,

Respondents.

REPLY BRIEF FOR PETITIONER

In the light of certain statements contained in Respondent's brief and the seriousness of the problem presented, Petitioner deems it advisable and appropriate to file a Reply Brief. The questions which are raised by this appeal are set forth at length at pages 3 and 4 of our Petition.

Respondents do not dispute the facts as set forth in Petitioner's complaint, nor are any questions raised as to their accuracy and veracity. They are conceded by Respondent (Resp., pp. 4-6).

ARGUMENT

Erroneous Statement at Page 9 of Respondents' Brief.

Respondents charge that Petitioner "expressly disclaims any objection to the court-martial proceedings *per se*" (Resp., p. 9). However, respondents do not fully quote

the position which we take, namely, that for the PURPOSES OF THIS PETITION we do not attack the court-martial *per se*. The argument which is advanced by Respondents is taken out of context. It raises an unfair inference that we do not intend to question the court-martial proceedings. However, in the event our appeal is sustained, we shall show the impropriety of the court-martial proceedings because the manner in which the pretrial examination was conducted so distorted the proof of the facts involved as to render the trial a nullity.

Differences Between the* Humphrey *Case and the Case at Bar.

At page 10 of Respondents' brief the Government *admits* that there are factual differences between the case at bar and *Humphrey* v. *Smith*, 336 U. S. 695. The following table clearly reveals the differences between the two cases:

Humphrey Case	*Case at Bar*
1. Conviction for *rape* and *assault* with *intent* to rape.	1. Charged with appropriating and converting certain captured German Currency; illegal currency transactions; wrongfully warning a civilian to leave town to avoid arrest.
2. Investigation conducted.	2. Investigation improperly conducted.
3. Entire findings approved.	3. Only one finding approved.[1]

1 While the sentence was approved by the under-secretary, only one finding by the court-martial, that petitioner had unlawfully converted 30,000 Reichmarks, was approved (R., pp. 21-22).

Humphrey Case	*Case at Bar*
4. Accuser, impartial investigator and assistant trial judge advocate same person.	4. Defendant's counsel and investigating officer same person.
5. The irregularities of the pretrial investigation complained of did not affect the fairness of the trial.	5. The irregularities complained of rendered the trial a gross injustice.

We respectfully submit that there are sufficient facts to take the case at bar out of the holding of the *Humphrey* case. As stated in the *Humphrey* case, the all-important safeguards of Article 70 in the case at bar were not fully accomplished. But, despite Petitioner's protestations the reviewing authority did not consider this glaring violation of procedure. As a result of non-compliance Petitioner has been substantially injured. At page 697, this Court wrote as follows:[2]

> "We do not think that the pre-trial investigation procedure required by Article 70 can properly be construed as an indispensable prerequisite to exercise of Army general court-martial jurisdiction. The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to an accused. *Its language is clearly such that a defendant could object to trial in the absence of the required investigation.* In that event the court-martial could itself postpone trial pending the inves-

---

2 *Humphrey* v. *Smith*, 336 U. S. 695; also see Footnote 4 at p. 698.

tigation. *And the military reviewing authorities could consider the same contention reversing a court-martial conviction where failure to comply with Article 70 has substantially injured an accused.*" (Emphasis supplied.)

The Delay Before Trial and the Charge of Negligence in Not Preparing Petitioner's Case.

At page 11 of Respondents' brief, the Government attempts to excuse the long period of time which ran between the presentation of the first set of charges, dated June 29, 1945, and the second set of charges, *redrafted*[3] on September 8, 1945, culminating in the court-martial on February 18-19, 1946 (R., p. 18), by charging Petitioner with negligence in preparing his case for trial. Even had Petitioner known that the charges had been found sufficient to warrant court-martial he was not a free agent to go and do as he wished; he was an officer in the Army, limited and restricted by orders and regulations.

Despite various inquiries by Petitioner as shown by the court-martial Record, Command never advised Petitioner that the Major Taylor investigation had found the charges sufficient to warrant a court-martial until over eight months had passed. This great delay followed Major Taylor's investigation which had been conducted with such haste in view of the deactivation of the 8th Corps as to prevent the proper presentation of Petitioner's case.

The fact that the charges investigated by Major Taylor in June were changed and redrawn in September, without Petitioner's knowledge, and even though changed as Respondents' claim, in a minor manner, demonstrates Petitioner's uncertainty and the futility of his position.

---

3 Respondents' brief, p. 6.

Petitioner could not, even had he been able, prepare his case for trial, since his unit was no longer in the area where the alleged violations were committed. Furthermore, command had issued orders proscribing the entry into this area by any United States personnel. Finally, the area had by that time been taken over by the Russian authorities, thereby preventing any person from crossing over into the Russian Zone of Occupation. Under the circumstances Petitioner could not prepare his case, examine witnesses or take any other pre-trial procedures so necessary for the proper presentation of his defense.

The Government took six months to prepare the charges and to interview its witnesses "on the ground" yet it placed Petitioner on terminal leave, and commissioned him a Lieutenant Colonel in the Reserves. *Suddenly, Petitioner was recalled to Germany, allowing him only five (5) days for preparation before trial.* Respondents thus denied him all means of obtaining witnesses.

It is our solemn conviction that Petitioner has been wrongfully convicted and has never had his day in Court. If this Court denies this Petition, then Petitioner must live the rest of his life under a cloud far darker than any prison sentence. Yet the fact that he is *not* in prison and himself cannot apply for a Writ of Habeas Corpus is the precise ground upon which the Lower Courts have denied him a hearing.

Here is the case of an American citizen, an Officer and a gentleman, holding the high rank of Lieutenant Colonel in the United States Army and a position of honor and distinction in civil life, while the country is at peace and while not in the "face of the enemy" being whisked out of his home and carried over-seas to be tried under the emergency conditions of a Field Court Martial on charges more than six months old.

The trial record received the perfunctory formality of a bureaucratic and administrative review and when appeal to the civil courts was attempted, Petitioner was defeated and denied the ordinary rights of a citizen by every legal technicality.

On the trial the Government totally failed to prove the amount of money involved. The Government charged grand larceny, *yet the jewelry, actually trinkets allegedly purchased with this money, was held by the Government for over a year and then returned to the Petitioner as having no connection with the case.* The Government used witnesses who would have no standing whatever in an American Court and who in no way connected Petitioner with the charges made. Yet, the appeal for review was denied on purely technical grounds. Petitioner has never had his day in Court.

The military establishment knew that, once the United States Army abandoned the area in favor of the Russian occupation forces it was a foregone conclusion that Petitioner could not obtain the information he required to prepare his case.

The very fact that Petitioner was returned to the United States for separation from service, and the very fact that Petitioner entered upon terminal leave definitely established in Petitioner's mind that the military establishment had abandoned his case. By such action Petitioner was lulled into a sense of false security through no fault of his own. Therefore, Petitioner thought it was no longer necessary to do anything further with the case.

The Wrongful Designation of the Investigating Officer.

The action which the military authorities took in appointing Major Taylor as investigating officer was improper and in violation of the canons of ethics governing

the conduct of attorneys. The Government brief does not explain the reason for this action, nor does it try to answer Petitioner's charges regarding the same. We submit that their action resembles in many respects the entrapment cases which are met in criminal cases. Had the military authorities proceeded in the usual manner, the information which the investigating officer had obtained could never have been used in obtaining a finding of guilty. It was through entrapment that the military authorities were able to accomplish that which they could not have done through the normal processes of investigation and preferring of charges and specifications. This Court has held that entrapment may not be employed for the purpose of obtaining a conviction.

Sorrells v. *United States,* 287 U. S. 435;
Butts v. *United States,* 273 Fed. 35.

We submit that the action taken with regard to the appointment of Major Taylor to the post of investigating officer was wholly improper. Such action was a violation of Petitioner's constitutional rights. The improper procedure substantially injured Petitioner, thereby laying the groundwork which ultimately resulted in a finding of guilty.

The equities are with the Petitioner. He should be given an opportunity to be heard. The finding of guilty in his case was in violation of substantial justice, Army Regulations, the Articles of War and all statutes applicable thereto, and finally the code of ethics governing the conduct of attorneys-at-law.

CONCLUSION

For the reasons set forth in Petitioner's Original and Reply Briefs, we sincerely urge that this Writ of Certiorari should issue.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 691

WILLIAM M. BROWN, PETITIONER

v.

KENNETH C. ROYALL,[1] SECRETARY OF THE ARMY, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 96-99) is reported at 81 F. Supp. 767. The Court of Appeals for the District of Columbia Circuit wrote no opinion, simply entering an order granting the respondents' motion to affirm (R. 113).

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[1] Kenneth C. Royall resigned as Secretary of the Army on April 27, 1949. His successor does not appear to have been substituted within the six months allowed by Rule 25(d) of the Federal Rules of Civil Procedure.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court's order of dismissal was entered on October 13, 1949 (R. 113). A motion for reconsideration of this order, filed October 28, 1949, was denied on January 12, 1950 (R. 114, 117). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's allegations, that the preliminary procedures specified by the 70th Article of War were not complied with, that he was denied adequate opportunity to prepare his defense, and that his case was not prosecuted promptly, were properly held insufficient as a basis for setting aside petitioner's court-martial conviction in this declaratory judgment action.

STATUTE INVOLVED

Article of War 70 (Act of June 4, 1920, c. 227, subch. II, § 1, Art. 70, 41 Stat. 759, 802, as amended by the Act of August 20, 1937, c. 716, § 2, 50 Stat. 724, 10 U.S.C., 1946 ed., 1542), as it read at all times relevant hereto, provided: [2]

> Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of,

[2] Effective as of February 1, 1949, most of the provisions of Article of War 70 were removed and (with two amendments) renumbered as Article of War 46a, Article of War 46b, Article of War 46c, and Article of War 47b. Act of June 24,

or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay

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1948, c. 625, Title II, §§ 222, 231, 244. All that now remains of Article of War 70 as it formerly stood is the first two sentences of the fourth paragraph.

It is clear, however, that the former Article of War 70 governs this case.

in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

STATEMENT

On February 18 and 19, 1946, petitioner was tried by a general court-martial in Heidelberg, Germany, on charges that he had, while serving as a military government officer in Weimar, Germany (1) appropriated and converted certain captured German currency and bonds belonging to the United States, (2) engaged in illegal currency transactions, and (3) wrongfully warned a civilian to leave town to avoid arrest by military government authorities (R. 18-20). Finding him guilty

as charged (except for the finding that he had appropriated 30,000 rather than 96,000 Reichsmarks), the court-martial sentenced petitioner to be dismissed from the service, to forfeit pay and allowances due and to become due, and to be confined for one year (R. 20). After the sentence had been reviewed and approved by the Commanding General of the Seventh Army, the Board of Review, the Judge Advocate General, and the Under Secretary of War,[3] petitioner was confined for three months at a branch of the United States Disciplinary Barracks (R. 21-22, 8).

Some time after his release from confinement,[4] petitioner instituted this action. The presently material facts, as set forth in petitioner's amended complaint (R. 5-26), are as follows:

On or about June 27, 1945, petitioner was called before an Army Inspector General and examined concerning the transactions for which he was later to be tried by court-martial (R. 6). On the same day, petitioner discussed these matters with a fellow officer, one Major Taylor, who was an attorney

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[3] The Under Secretary, while approving the sentence, approved only the court-martial's finding that petitioner had unlawfully converted 30,000 Reichsmarks (R. 21-22).

[4] The record does not show precisely when petitioner was released or when this suit was commenced. The record does show, however, that the sentence was approved by the Under Secretary on October 8, 1946 (R. 18-22), that petitioner's dismissal from the service was effective October 18, 1946 (R. 22), and that the motion for leave to file an amended complaint in the present action was filed on May 6, 1948 (R. 1).

and from whom petitioner sought legal advice (R. 9). On June 29, 1945, charges and specifications were prepared and signed (R. 11, 22-26). On the following day Major Taylor was appointed Investigating Officer to conduct the inquiry required by Article of War 70 [5] (*supra*, p. 2) before referral of charges for trial by court-martial (R. 10). Petitioner requested a continuance of the investigation in order to call witnesses on his behalf, but his request was refused, the Investigating Officer explaining that the Eighth Corps was about to be deactivated and that he had been ordered to complete his investigation promptly (R. 10).

For some months after the investigation, petitioner heard nothing further about the charges against him (R. 11). On December 27, 1945, he was granted 84 days of terminal leave pursuant to orders which provided that he would revert to inactive status on March 23, 1946, at the end of his leave (R. 14-15). On January 30, 1946, petitioner was recalled from terminal leave and transported to Heidelberg, Germany, to stand trial (R. 7, 18). The charges and specifications upon which he was tried had been re-drafted on September 8, 1945 (R. 12), but alleged essentially the same facts and invoked the same Articles of War as had those preferred on June 29, 1945 (compare R. 18-20 with R. 23-25).

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[5] References herein to AW 70 refer to that Article as it existed at the time of the events involved in this case. See note 2, *supra*.

In his complaint in the present action, petitioner asserted that the court-martial which convicted him had lacked jurisdiction for the following reasons:

1. The order placing him on terminal leave prevented his subsequent recall and trial (R. 7).[6]

2. The requirements of Article of War 70 had been violated in that (a) the officer he had "retained" for legal advice served as Investigating Officer; (b) his request for a continuance of the investigation was denied; (c) the Investigating Officer refused to call petitioner's witnesses or take their depositions; (d) petitioner was denied an opportunity at the investigation to cross-examine the witnesses against him; (e) eight months were permitted to elapse between the investigation and the trial, resulting in loss of witnesses for the defense; (f) the trial was based on charges and specifications drafted on September 8, 1945, as to which no new investigation had been conducted (R. 9-12); (g) petitioner had "had no opportunity to prepare his case for trial" (R. 13).

For these reasons, petitioner prayed for a judgment or decree setting aside the Under Secretary's order which approved the conviction and sentence and ordering the defendant, General Wit-

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[6] This contention has been abandoned in the petition for certiorari. Cf. *Hironimus* v. *Durant*, 168 F. 2d 288 (C. A. 4), certiorari denied, 335 U.S. 818.

sell, to reform petitioner's military records accordingly (R. 13).

The respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted, arguing, *inter alia,* that there was no jurisdiction to review a court-martial order in this type of proceeding and that petitioner's complaint was, in any event, without merit (R. 27-46). Holding that it was without power to hear what amounted to an appeal from a court-martial conviction, the district court granted the motion to dismiss (R. 96-99, 100).

While petitioner's appeal was pending in the court below, this Court decided *Humphrey* v. *Smith*, 336 U. S. 695, holding that the pre-trial procedure required by Article of War 70 was not "an indispensable prerequisite to exercise of general court-martial jurisdiction" (336 U. S. at 697). Relying upon the authority of that decision, respondents moved for affirmance of the district court's judgment without further briefs or argument (R. 103-106). In a *per curiam* order dated October 13, 1949, this motion was granted (R. 113).

ARGUMENT

Whether, and in what circumstances, one convicted by a court-martial but no longer subject to restraint may seek judicial review of that conviction is a question which need not be answered in

this case (cf. district court opinion, R. 96-99).[7] For this Court's decision in *Humphrey* v. *Smith*, 336 U. S. 695, rendered after the district court's decision in the instant case, all but disposes of petitioner's contentions. Petitioner expressly disclaims (Pet. 16) any objection to "the court-martial proceedings *per se*" and states that his "attack is leveled against the preliminary proceedings * * *." This attack, though variously and insistently formulated (Pet. 2, 7, 8, 16, 24), amounts almost entirely to the assertion that petitioner was denied the "thorough and impartial investigation" required by Article of War 70. But this precise question was raised and disposed of a year ago in *Humphrey* v. *Smith*, which held that a "court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War." 336 U. S. at 701. As petitioner

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[7] It should be noted here that petitioner's suit would appear to be at least premature because of his failure to invoke the military review available to him under Article of War 53 (Act of June 24, 1948, c. 625, Title II, § 230, 62 Stat. 604, 639, 10 U.S.C., 1946 ed., Supp. II, 1525). *McMahan* v. *Hunter*, 179 F. 2d 661 (C.A. 10), petition for certiorari pending, No. 350 Misc.; *Spencer* v. *Hunter*, 177 F. 2d 370 (C.A. 10); *Whelchel* v. *McDonald*, 176 F. 2d 260 (C.A. 5). This Article provides that one in petitioner's position may, within one year after termination of World War II, apply to the Judge Advocate General, who is empowered "to grant a new trial, or to vacate a sentence, * * * and substitute for a dismissal * * * previously executed a form of discharge authorized for administrative issuance * * *."

points out (Pet. 16-17, 21-22), the facts in this case are of course different from those in *Humphrey* v. *Smith*. Petitioner is unable to show, however, that these factual differences make the rule in *Humphrey* v. *Smith* inapplicable here, and he suggests no reason for reconsidering that decision now.

One aspect of petitioner's grievance which may not be directly covered by *Humphrey* v. *Smith* is his contention that he "had no opportunity to prepare his case for trial" (R. 13, Pet. 6, 7, 17). But this contention, even if cognizable by the civil courts after the extended review already accorded by the military authorities (R. 21-22) (cf. *Hiatt* v. *Brown,* 339 U.S. 103), is without factual basis in the present case. Petitioner's allegation (Pet. 6, 15) that he was confronted at his trial with charges about which he had had no previous knowledge is flatly refuted by the record. The charges preferred in June, 1945, were in fact redrafted, but the unlawful transactions alleged were unchanged except in trivial and immaterial respects (for example, the new specifications alleged appropriation of 96,000 rather than 97,000 Reichsmarks). Compare R. 18-20 with R. 23-25.

Equally without substance are petitioner's claims that he had no sufficient opportunity to interview witnesses in his own behalf, that the court-martial should have granted a continuance for

such interviews, and that he had in any event "lost every opportunity to defend himself" when his witnesses were not called at the pre-trial investigation (Pet. 2, 7, 11, 18, 24). Petitioner knew the charges against him on June 30, 1945 (R. 10). During the period of almost eight months between that date and his trial, petitioner was given no basis for supposing that these charges were being dropped (R. 11). Now he presses a groundless protest against this delay,[8] together with the inconsistent complaint that he was tried in undue haste. The important point here is that there is not the slightest basis in the record for the conclusion that petitioner lacked more than ample time to take depositions and gather whatever evidence he needed. As he points out (Pet. 15), he did not return to the United States until December, 1945. He does not assert that he did anything during the

[8] Petitioner suggests no basis either in the Articles of War or in constitutional law for the contention (Pet. 7, 17, 24) that the court-martial was without jurisdiction because of the delay of nearly eight months between the preferring of the original charges and his trial. So far as this argument may be addressed to Article of War 70, it should be noted that this Article provided only that when a "person subject to military law *is placed in arrest or confinement,* immediate steps will be taken to try the person accused or to dismiss the charge and release him." (Italics added). It may be noted, in addition, that Article of War 39 provided at the time of petitioner's trial (Act of June 4, 1920, c. 227, subch. II, § 1, Art. 39, 41 Stat. 759, 794, 10 U.S.C., 1946 ed., 1510), and still provides, for a two-year limitation period upon prosecutions for the type of offense involved here. There is, in short, no constitutional or statutory limitation upon either military or civil prosecutions which would warrant nullifying petitioner's conviction on the ground of such pre-trial delay as occurred in this case.

six months preceding his return or during his month of terminal leave thereafter, to protect himself against the alleged loss (R. 11) and inaccessibility (Pet. 6) of his claimed witnesses. Having been allowed the five days for preparation required by Article of War 70 (in time of peace) even after his return to Germany for trial (Pet. 18), petitioner has no basis for his contention that due process required further delay in the circumstances of this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1950

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and
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR RECONSIDERATION OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR RECONSIDERATION OF PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now William M. Brown, the petitioner in the above entitled cause and presents this, his petition for reconsideration of the petition for a writ of certiorari to the United States Court of Appeals for the District

of Columbia Circuit and, in support thereof, respectfully shows:

I

On May 8, 1950 this Honorable Court denied petitioner's petition for a writ of certiorari, hereinafter referred to as the petition.

II

That by denying said petition, this Honorable Court has denied to petitioner and foreclosed to him any possibility of demonstrating to a civil court the truth of the allegations contained in said petition and the reasons why an appeal should be allowed.

That since the inception of the action from which this petition emanates, petitioner has been denied the right to present his case to a court and to explain and show the reasons why the order of the general court-martial (R. 18-26) should be set aside and vacated.

III

That there are substantial differences in the facts between the case of *Humphrey* v. *Smith,* 336 U. S. 695, and the case at bar, which abundantly demonstrate that this case should not be considered bound by the holding of the *Humphrey* case.

IV

That this action is not premature as asserted by respondents (ftn, App. 9), for it was instituted on the 4th day of December, 1947, which was prior to the enactment of AW 53, Act of June 24, 1948, c. 625, Title II, §230, 62 Stat., 604, 639, 10 U. S. C., 1946 ed., Supp. II, 1525.

V

That while AW 53 hereinabove referred to would at first blush appear to give a substantial right to petitioner, it is apparent that the discharge he would obtain, in the event that said discharge was granted, would not be equivalent to an honorable discharge, and the rights and privileges accruing to a discharge issued under AW 53 would be different from those of an honorable discharge to which petitioner is entitled.

VI

That as the matter presently stands, petitioner has been foreclosed from presenting his case to any court and must live under a cloud for the rest of his life, due to an initial error made at a time when he was unable to defend himself as provided for by law.

VII

That what occurred at the time petitioner was held for trial before a general court-martial was in violation of the Constitution, Articles of War, Army regulations, and all other statutes applicable thereto. That in support of petitioner's contention, the following authorities are submitted to this Honorable Court for consideration:

A. *A Manual for Courts-Martial, U. S. Army, 1928* (corrected to April 20, 1943), provides as follows:

"123. COURTS-MARTIAL—RULES OF EVIDENCE—Privileged and Nonprivileged Communications.

a. General.—A privileged communication is one that relates to matters occurring during a confidential

relation which it is the public policy to protect. A witness can decline to answer a question touching such a communication, and where the privilege is that of the accused, or of the Government, or of any person other than the witness, the court will not permit the witness to answer such question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be.

b. Certain privileged communications.—Communications Between * * * Between Attorney and Client. * * * *The testimony of the attorney as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by a court,* unless such communications clearly contemplate the commission of a crime; * * * Of course, communications prior to or subsequent to the relation are not privileged. The client, but not the attorney, may waive this privilege. * * *"(pp. 130, 131). (Emphasis supplied.)

B. *Manual for Courts-Martial, U. S. Army, 1949*:

"137. PRIVILEGED AND NONPRIVILEGED COMMUNICATIONS.—

a. General.—*A privileged communication is one that relates to matters occurring during a confidential relation which it is the public policy to protect.* A witness can decline to answer a question touching such a communication, and if the privilege is that of the accused, or of the Government, or of any person other than the wit-

ness, the court will not permit the witness to answer the question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be.

b. Certain privileged communications— * * * Attorney and client * * *

The testimony of an *attorney* * * * *as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by* a court unless such communications clearly contemplate the commission of a crime; * * *" (pp. 181, 182). (Emphasis supplied.)

C. *Military Justice Handbook.* Department of the Army Pamphlet No. 27-6:

"2. *Qualifications of Counsel* * * *

b. Effect of prior participation in same case. No person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case may subsequently act in the same case as a member of the prosecution; no person who has acted as member, trial judge, advocate, assistant trial judge advocate, or investigating officer in any case may subsequently act as defense counsel or assistant defense counsel in the same case unless he is expressly requested by the accused (AW 11). Whether counsel for either side have participated previously in any capacity in any case must be shown affirmatively in the record of trial (MCM, App. 5) (p. 2).

Petitioner submits that his case is similar in many respects to that of *Wong Yang Sang* v. *McGrath,* No. 154, October 1949 Term decided by this Honorable Court on February 20, 1950 and reported at 339 U. S. 33. It will be recalled that in the cited case the error which led to reversal was the use of an inspector who acted as presiding officer and prosecuting officer, thereby depriving Sang of a fair and impartial hearing. Likewise in your petitioner's case there was a deprivation of due process and a violation of his constitutional rights by the Army's use of petitioner's counsel as Investigating Officer.

It is Petitioner's contention that as was so well stated in the *Sang* case, *supra,* at page 50, "• • • When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." These standards of impartiality were not accorded this petitioner and therefore it is respectfully submitted that your petitioner was deprived of his constitutional rights and denied due process.

Your petitioner further submits that in his case the Investigating Officer could not properly perform his office in the same manner as an impartial man since the investigating officer had been retained originally as defense counsel. The result of such a situation was to create in the impartial investigating machinery conflicting spheres of interest which would prevent, in any event, the fair and impartial investigation required by the Articles of War, Army Regulations and all statutes applicable thereto.

VIII

Your petitioner is now so situated that he cannot, under any circumstances, by virtue of the ruling of this Honorable Court, attack the court-martial findings and thus vindicate himself.

WHEREFORE, upon the foregoing grounds, it is respectfully requested that this petition for reconsideration of the petition for certiorari to the Court of Appeals for the District of Columbia Circuit be granted, and that on reconsideration this Honorable Court grant the petition for certiorari to the Court of Appeals for the District of Columbia Circuit, and for such other and further relief as may be just and proper in the premises.

Dated: May 22, 1950.

Respectfully submitted,

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Certificate

I, MORTON SINGER, one of the counsel for the above named petitioner, William M. Brown, do hereby certify that the foregoing petition for reconsideration of the petition for certiorari to the Court of Appeals for the District of Columbia Circuit is presented in good faith and not for the purposes of delay; that the petition is restricted to the grounds above presented and to other substantial grounds available to petitioner although not previously presented.

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MORTON SINGER,
one of Counsel for petitioner.